Written by Nick Sanders
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Occasionally we are asked to assist small companies with matters that are clearly in the province of legal counsel. When faced with such requests, we decline as courteously as possible and offer to recommend one or more attorneys to the interlocutor. Sometimes people simply, and directly, ask us for such referrals. In each case, we try to recommend at least two, or preferably three, attorneys who have knowledge and experience in the government contracting arena. And that's where our involvement in the matter ends.

To those requestors who are seeking *pro bono* legal assistance: count us out. That's between you and the attorney. We note for the record, however, that if you can't crisply explain your business entity's mission and why you *deserve* to get free legal assistance while everybody else has to pay through the nose, then we don't think too much of your chances of getting what you want. (Oh, and to the nice lady who offered to construct a temporary website just so the attorneys could visit it to learn about your NFP entity, we hope you eventually realized why that was not a step that was going to inspire confidence and lead them to giving you free services.)

But make no mistake: *when you go into battle against the Federal government, you need the very best attorneys you can afford to hire*. Today we're going to explore two cases which offer support for that axiom.

SplashNote Systems, Inc. (ASBCA No. 57403, Nov. 29, 2011)

We missed this one when it was published in early December and we need to acknowledge and thank Karen Manos' Government Contract Costs, Accounting & Pricing Report (West Publishers) for bringing it to our attention. As **Ms. Manos** (Co-Chair of Gibson, Dunn & Crutcher's Government Contracts Practice Group) noted, "For a case with so little at stake, the recent decision … cuts a surprisingly broad and destructive swath through the Federal Acquisition Regulation cost principles." See the full ASBCA decision **right here**

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SpashNote, represented by its President and CEO, Mr. Scott Tse, appealed an ACO decision demanding $84,950 in indirect costs that had been determined to be unallowable. The costs in question included deferred IR&D expenses ($59,417), a bonus paid to Mr. Tse ($34,168), and local meal expenses "to discuss recruiting with professional colleagues" ($478).

With respect to the deferred IR&D the ASBCA disagreed with SpashNote's assertions that that the IR&D cost principle (at 31.205-18(d)(2)) was permissive and that an advance agreement regarding acceptance of the costs was optional. The ASBCA also disagreed with the assertion that the company was required to defer its IR&D costs under SFAS No. 86. Finally, the ASBCA disagreed that the Government was estopped from disallowing the deferred IR&D costs, since it had not previously raised the issue during prior DCAA accounting system reviews and (limited scope) audits of the company's 2004 incurred costs.

As Ms. Manos opined in the CP&A Report, "The ASBCA seems to have missed the point of FAS 86. … After 'technological feasibility' has been established, the software is no longer IR&D, and is therefore subject to FAR 31.205-25, Manufacturing and production engineering costs, rather than FAR 31.205-18. Unlike FAR 31.205-18 … 31.205-25 expressly contemplates the capitalization and amortization of production development costs."

With respect to Mr. Tse's bonus, the ASBCA decided that it was a distribution of profits and thus unallowable, even though (as Ms. Manos noted) "the Government determined that Mr. Tse's total compensation was reasonable and despite SplashNote's evidence that it had a bonus agreement and an established bonus plan that it consistently followed.

With respect to the claimed recruiting-related meals, the ASBCA decided that they were also unallowable, primarily because SplashNote failed to provide sufficient information to show that the costs complied with the 31.205-43 Cost Principle. In addition—as Ms. Manos noted—"the ASBCA conflated the requirements for recruiting costs and travel costs."

To sum up, this decision is a great example of why you need to hire knowledgeable and experienced government contracts attorneys when you decide to take on the Federal government in a court of law. Mr. Tse represented his company and clearly failed to raise many of the points Ms. Manos—one of the top government contract practitioners in the country—noted in her commentary regarding the decision. As a result, SpashNote lost its case, spectacularly.

General Dynamics Ordance & Tactical Systems, Inc. (ASBCA Nos. 56870, 56957, Feb. 3, 2012)

This case is a great example of how really good attorneys manage a difficult case. This is not a final decision on the merits of the case; instead, it involves the disposition of a motion for sanctions, filed by GDOTS against the U.S. Army. Basically, GDOTS' attorneys (notably **David Churchill** of Jenner & Block) had to push the ASBCA Judges to sanction the Government attorneys

while respecting the legal niceties. Talk about a tough balancing act!

Here's a link to the full ASBCA decision on the motion for sanctions.

For starters, you need to know that GDOTS has been looking for $18.2 Million from the Army "to recover unanticipated costs based upon claimed inadequate government estimates of ammunition quantities". This matter has been in litigation since 2009—roughly three years. And while the matter has been pending, Contract Disputes Act interest has been accruing. By now, we're guessing that the Army is on the hook for far more than the original $18 Million.

The contentious issue at the heart of this decision concerned whether or not the Army would release documents it asserted contained protected trade secrets of GDOTS' competitor, Alliant Techsystems (ATK). The presiding Judge reviewed the documents *in camera*, and described them as follows—
For the most part, these documents consisted of e-mails between government employees that referred to ATK unit prices and production capacity for specified rounds of ammunition at the government-owned, contractor-operated facility known as the 'Lake City Army Ammunition Plant' (LCAAP), or related to information from which this type of information could be derived.

The Board acknowledged that the documents contained ATK trade secrets, but issued an order directing the Army to disclose them anyway, under a protective order. The Army continued to refuse to turn over the documents and, three months later, GDOTS filed a motion for evidentiary sanctions. Nearly a year passed, with motions and replies and counter-motions being filed. Eventually, GDOTS "renewed its motion for evidentiary sanctions."

Nearly two months later, the Army produced the documents—but "redacted the information that is the subject of [GDOTS'] motion for sanctions." The ASBCA was not pleased. The Judges wrote—

We have considered the following factors in determining whether sanctions should be imposed in Board appeals: the willfulness of the offending party; the degree of prejudice involved; the delay, burden and expense incurred by the movant; and evidence of the offending party's lack of compliance with other Board orders. … we believe that the Army's refusal to comply with the Board's orders was neither accidental, inadvertent or negligent, nor was the Army's action impetuous or without aforethought. The Army's refusal was knowing, deliberate and intentional and was submitted to the Board in writing. …

As a result of the foregoing, the ASBCA decided to impose evidentiary sanctions. In the words of the Judges—

We draw an adverse inference from the Army's refusal to provide the disputed discovery information to appellant's counsel, specifically, that said evidence, if disclosed, would show that there was relevant information available to the Army that it failed to consider when developing the estimates in question for the solicitation documents, thereby causing the estimates to be

inadequately or negligently prepared.

That finding sounds pretty benign, but in reality it was a body blow (if not a right hook to the jaw) of the Government's case. The GDOTS attorneys had successfully walked the tightrope and had positioned their client for a successful outcome.

This is what you want from your government contracts attorneys. Whether you are seeking premier subject matter expertise (as Ms. Manos casually displayed) or a mastery of litigation strategy and tactics (as the Jenner & Black attorneys demonstrated), you want the best on your side when you take on the U.S. Government. Yes, you are going to pay quite a bit. And regardless of the expertise of your attorneys, it's going to take a frustratingly long time to get your case heard. But having the right attorneys on your side is going to increase your chances of a successful outcome.

Availing yourself of your rights under the Contract Disputes Act is a tough choice and a tough road to walk. You may have less than $100,000 or more than $18 Million at stake. Regardless of the amount in dispute, it is *not* the time to count pennies.